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TO PROTECT NATIVE AMERICAN CULTURES AND TO GUARANTEE THE FREE EXERCISE OF RELIGION BY NATIVE AMERICANS

OCTOBER 8 (legislative day, SEPTEMBER 12), 1994.—Ordered to be printed

Mr. INOUYE, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2269]

The Committee on Indian Affairs, to which was referred the bill (S. 2269) to protect Native American cultures and to guarantee the free exercise of religion by Native Americans, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 2269 is to protect Native American cultures and to guarantee the free exercise of religion by Native Americans.

BACKGROUND

Historical background

There has been a long history in this country of discrimination against Indian religions, dating back to the arrival of Christopher Columbus in the new world, continuing throughout colonial times and into the present times. This nation's history of federal suppression of traditional cultural and religious practices by Native Americans is unlike the manner in which any other culture or religion has been treated.

Native American religions have always received special treatment by the Federal Government. An integral part of the Federal Government's assimilative policies in the late 1800s and early 1900s was the replacement of traditional Indian religions with

Christianity. Christianity was equated with civilization and Indian religions were regarded as uncivilized and immoral. Indian religions and cultural practices were singled out and Federal laws were enacted to prohibit the exercise of Indian religions and cultural practices. Indian people were forbidden from speaking their language, dancing their dances, wearing their traditional dress, and holding any religious ceremonies. In addition, federal policies such as the pervasive allotment of tribal land, criminalization of traditional Indian religious practices, promotion of Christian missions in Indian Country and the separation of young Indian children from their parents and traditional culture through the federal boarding school system were overt forms of discrimination against Indian cultures and religions.

In 1978, the Congress enacted the American Indian Religious Freedom Act (P.L. 95–341) in an effort to establish a policy that would correct the long history of government discrimination and suppression of Native religious freedom. With the passage of the Act in 1978, it became the policy of the United States to protect and preserve the right of American Indian, Eskimo, Aleut, and Native Hawaiian people to believe, express, and exercise their traditional religions. While it was the intention of the Congress to have these traditional religious practices protected, this desired result has not been accomplished.

While the American Indian Religious Freedom Act of 1978 (AIRFA) has served as a statement of policy, it has not been sufficient to discourage activities of federal and state agencies which limit or prohibit Native American religious practices. Since the passage of the American Indian Religious Freedom Act in 1978, there have been a number of court rulings involving the rights of Native Americans to engage in traditional religious practices. In two Indian cases, *Lyng* v. *Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988) and *Employment Div., Dept. of Human Services* v. *Smith,* 494 U.S. 872 (1990), he Supreme Court interpreted the First Amendment of the United States Constitution in a manner which made it clear that the First Amendment is not available to practitioners of Native American religions as a mechanism to prevent the government from interfering with the practice of native religions.

For many Native Americans, sacred sites on public lands are holy places of worship—their equivalent of churches, temples or synagogues. *Lyng* held that the First Amendment Freedom of Religion clause does not restrict the government's management of its lands, even if certain governmental actions would infringe upon or damage a religion, so long as the government's action does not compel individuals to act contrary to their religious beliefs. The Supreme Court made it clear in the *Lyng* case, that the government's use of its own land does not impose a burden on religious exercise, even if a Native American sacred site is destroyed, or even if a Native American religion is thereby destroyed.

The sacramental use of peyote is central to the ceremonies of the Native American Church and is one of the oldest religious traditions in the western hemisphere. In the *Smith* case, the Supreme Court held that the Free Exercise clause of the First Amendment permits states to prohibit the sacramental use of peyote and thus

to deny unemployment benefits to persons discharged from their employment of such use. In the Supreme Court's ruling in *Smith*, the Court also rejected the First Amendment test that had always been used—namely that the government has to have a compelling state interest to justify infringing on the free exercise of religion. The decision in *Smith* created a religious crisis for all Americans when the Supreme Court abandoned the compelling state interest test that had served as the legal standard applied in First Amendment cases for scores of years. The *Smith* decision sent shock waves through Indian communities nationwide, caused an outcry from religious institutions across the country, and created a need for legislation that would restore the compelling state interest test.

On November, 16, 1993, the Religious Freedom Restoration Act (RFRA) was enacted into law (P.L. 103–141). While enactment of RFRA reversed the Supreme Court's ruling in the *Smith* case, and restored the "compelling state interest test" applicable to free exercise cases, ironically the new law does little to protect the free exercise of traditional Native American religions. The legislative history of the RFRA (S. Rep. 103–111) suggests that the federal government's use of its land does not burden anyone's free exercise of religion and therefore will not affect the Supreme Court's ruling in *Lyng*. The RFRA's legislative history made it clear that the compelling state interest test does not apply to Native Americans exercising their traditional religious practices at sacred sites located on this nation's public lands. Such legislative history will therefore make it difficult to utilize the RFRA to protect Native Americans who worship at sacred sites throughout the country.

The *Lyng* and *Smith* cases significantly diminished constitutional and statutory protection of Native American religious practices and demonstrated that the religious practices of American Indians were not protected by the First Amendment. The Supreme Court's rulings severely undermined the intent of the 1978 Act and made it clear that while the 1978 Act was a sound statement of policy, it required enforcement authority. The decisions in these two cases made legislation, that would provide specific protection for the unique and religious beliefs of Native Americans, necessary.

Legislative background

Legislation proposed in the Congress has primarily focused on responding to the *Lyng* and *Smith* cases. In the 101st Congress, five bills were introduced: S. 1124 (Sen. McCain), S. 1979 (Sen. Inouye), S. 3254 (Sen. Biden), H.R. 1546 (Rep. Udall), and H.R. 5377 (Rep. Solarz). The Inouye, McCain, and Udall bills specifically proposed amendments to the American Indian Religious Freedom Act (AIRFA), while the Biden and Solarz bills addressed matters of religious freedom in general. In the 100th Congress, Senator Cranston introduced S. 2250, which would have amended AIRFA by adding provisions regarding management of federal lands. S. 3254 and its companion bill H.R. 5377, were introduced in response to the *Smith* case and would have restored the compelling interest standard of review in religious freedom cases. Senator Inouye introduced S. 110 in the first session of the 102nd Congress, a bill which would have restored the compelling interest test and created a judicial cause of action.

After Senator Inouye introduced S. 110, national Indian organizations and Native Hawaiian organizations began to urge a more comprehensive set of amendments to the 1978 Act. A draft bill was prepared by a coalition of Indian organizations and circulated to Indian tribes, national Indian organizations, and Native Hawaiian organizations for review and comment. In support of this proposed legislation, Indian tribes and Native American organizations established a precedent setting, broad based coalition which includes leading environmental, human rights and religious organizations committed to supporting the passage of a measure which would provide protection for the exercise of Native American religion and the enforcement authority that was lacking in the 1978 Act.

For several years, the Committee on Indian Affairs has been working with the American Indian Religious Freedom Coalition and tribal leaders across the country to develop a measure that would provide protection for the free exercise of Native American traditional spirituality and religious ceremonies and practices. The culmination of that work was S. 1021, the "Native American Free Exercise of Religion Act," introduced by Senator Inouye on May 25, 1993, at the request of the American Indian Religious Freedom Act Coalition (AIRFA Coalition).

Prior to the introduction of S. 1021, the Committee held six field hearings in various regions of the country on a draft bill. Following introduction of S. 1021, two additional hearings were held in Washington, D.C. The first hearing was held on September 10, 1993 and addressed the constitutional issues associated with the various provisions of the bill. The second hearing was held on March 23, 1994 and focused on the recommendations from the Administration on modifications to the bill which would better balance the government's other statutory responsibilities with the need to protect the free exercise of Native American religions.

Dialogue with the Federal agencies

In addition to Committee hearings, Senator Inouye called upon all federal agencies that would be affected by the provisions of S. 1021 to meet with him, members of the AIRFA Coalition, and Committee staff to explore the willingness of federal agency representatives to work with the Committee to assure that the provisions of the bill were adapted to conform with other statutory responsibilities of the agencies and to develop a workable framework (from the vantage point of the federal agencies) for the protection of Native American sacred sites and the traditional cultural and religious practices associated with such sites that are located on public lands.

Representatives of the Department of the Interior agreed to serve as "lead agency" in the dialogue process that began in June of 1993 and continued throughout the ensuing year. Following the President's endorsement of a bill to protect the cultural and religious rights of Native Americans in November of 1993, the Domestic Policy Council staff of the White House assumed the coordinating function of assuring the participation and ongoing review of various amendments to the bill by the various federal agencies.

From June of 1993 through June of 1994, numerous meetings were held with members of the AIRFA Coalition and Administra-

tive representatives to identify issues and areas of concern, and to discuss provisions and proposals relating to S. 1021. The primary focus of the dialogue with the federal agencies was Title I, the sacred sites provisions of the bill, which generated the most interest from the agencies because of the potentially broad application of its provisions. This informal process produced consensus on many important issues, a narrowing of certain issues, and an overall refinement of S. 1021. S. 2269 was introduced as a new measure at the request of the Administration representatives, reflecting the progress made in the meetings with the Administration and AIRFA Coalition. S. 2269 does not amend the American Indian Religious Freedom Act (AIRFA) enacted into law in 1978, but was introduced in furtherance of the policy established in AIRFA.

EXPLANATION OF COMMITTEE AMENDMENTS

As originally introduced on July 1, 1994, S. 2269 contained five titles. Title I provides for the protection of Native American sacred sites. Title II provided statutory protection for the religious use of peyote, consistent with the laws of the 50 states that provide a statutory exemption for the religious use of peyote. Title III of the bill addresses the religious rights of Native Americans in prison settings. Title IV provides a process for the distribution of eagle feathers and other plant and animal parts that are used in Native American religious ceremonies from federal repositories. Title V authorizes a cause of action in federal district court for the violation of rights protected under the Act.

S. 2269, as amended, deletes the Title II peyote provisions of the bill, addresses the protection of the religious rights of individual Indians as they relate to actions by a tribal government, and incorporates additional refinements submitted to the Committee by the Departments of the Interior and Justice.

Title I—Protection of Native American sacred sites

There are currently over 44 Native American sacred sites that are threatened by tourism, development and resource exploitation. Title I of the bill provides for the protection of Native American sacred sites that are located on public lands. Although the original bill provided only for the protection of the sites themselves, the Interior Department urged that the bill extend protection to the traditional cultural and religious practices associated with such sites, and this approach is adopted in S. 2269, as amended.

The framework of the original bill established a process that would enable Indian tribes and federal agencies to enter into consultation if a Native American sacred site was to be detrimentally affected by a federal undertaking—following the model of the National Historic Preservation Act (NHPA). Rather than the NHPA federal undertaking concept, the federal agencies proposed a new term—covered federal activities—and the definition of what federal activities would be covered by the bill was carefully worked out with the agencies to their satisfaction.

The dialogue with the federal agencies also produced refined definitions of Native American sacred sites and what would constitute an adverse impact on such sites. The consultation process that is contained in S. 2269, as amended, provides for notice to affected

tribes and Native Hawaiian organizations when a covered federal activity may have an adverse impact on a Native American sacred site. In turn, the affected tribes or Native Hawaiian organizations must notify the federal agency of their desire to enter into a consultation process to assure that all viable alternatives to the potential adverse impact to a sacred site are given consideration. If there is no alternative other than to adversely affect a sacred site, the government bears the burden of establishing that there are no less restrictive means and that proceeding with the activity serves a compelling governmental interest.

S. 2269, as amended, provides several means for addressing potentially adverse impacts on sacred sites: (1) there is to be consultation between the relevant federal agency and affected parties; (2) memoranda of agreement can be entered into between the federal agency and the affected parties, which can contain the terms of access to the sacred site, and the actions the government may undertake to assure that a sacred site is not desecrated or destroyed; (3) the governmental agency is also authorized to establish an administrative process to assure that factual findings and legal determinations are made on a formal record; and (4) there is resort to federal court should the parties be unable to resolve the matter by any other means. The burdens of proof, production and persuasion of each party to a proceeding in federal district courts are specified in Title IV of S. 2269, as amended.

Each of the steps that agencies and affected parties may take to address a potentially adverse impact on a Native American sacred site, including the specific elements of a federal judicial proceeding, are the result of the year-long dialogue with federal agencies and is supported by those agencies.

Amendments to Title I were also included to address the concerns of those private corporations engaged in the development of the public lands. In addition, Chairman Inouye and Vice-Chairman McCain have agreed to host a dialogue between member tribes and organizations of the American Indian Religious Freedom Coalition and those private corporations who have expressed an interest in S. 2269. This dialogue is intended to elicit the concerns of those organizations that are engaged in the development of public lands and to address those concerns through amendments to S. 2269.

Title II—Prisoners' rights

Title II of S. 2269, as amended, extends to Native American prisoners the same and equal right to access to their religious leaders as is afforded to prisoners of any other religion, and further provides for the accommodation of Native American prisoners' religious practices to the extent that they do not conflict with legitimate penological objectives (a standard that is currently applied by the courts in determining the extent of accommodation to the religious rights of prisoners). The Committee is advised that there is full Administration support for this title.

Title III—Religious use of eagle feathers and other animals and plants

Title III provides statutory authorization for the process that President Clinton adopted in the Executive Order he signed on

April 29, 1994, whereby eagle feathers and other animal parts are made available to Indian tribes for religious and ceremonial use. The provisions of this title reflect the discussion with the federal agencies and has their support.

Title IV—Jurisdiction and remedies

Title IV authorizes a cause of action in federal district court for the violation of any of the rights protected by S. 2269, and sets forth the burdens of proof, production and persuasion on the parties to such an action.

Legal considerations

The protection of the traditional cultural and religious practices of Native Americans implicates First Amendment considerations with regard to the balance that must always be struck between the constitutional prohibition on governmental establishment of religion as well as the constitutional prohibition on governmental burdens on the free exercise of religion. However, the unique history of the federal government's relationship with Indian people raises a matter of first impression that the Supreme Court has not had occasion to address within the context of First Amendment law.

As section 101(6) of the congressional findings to S. 2269 set forth, notwithstanding the First Amendment's prohibitions on governmental entanglement with religion, from the earliest times of this nation's history, the United States has been very much involved in the traditional cultural and religious practices of Native Americans. Federal monies were appropriated and made available to religious groups in an effort to "civilize" and "christianize" the Indians. Indian children were removed from their homes and sent to religious schools and government-sponsored schools where they were prohibited from speaking their native languages or manifesting their traditional cultural ways in any manner. One of the most extreme examples of the government's efforts to suppress the expression by Native Americans of their traditional cultural and religious practices occurred when the government authorized the military to "round-up" Indian women and children found engaging in prohibited dances for incarceration and to shoot and kill Indian men who were engaging in such prohibited activities as the ghost dance and the sun dance. As recently as the early 1920's, the Commissioner of BIA was still sending out directives to suppress Indian dancing as a manifestation of the Indians' traditional ways, which were viewed as uncivilized.

Many Indian tribes had a theocratic form of government, and this too, was viewed as inimical to the American way of life. Accordingly, the federal government made tribal access to federal government and federal assistance contingent upon the adoption of secular forms of government. The well-known policy of forced removal of tribes from their aboriginal homelands left many tribes with no means of securing access to or protecting their traditional sacred sites.

It is this historical and pervasive pattern of religious discrimination and the concerted federal effort to suppress Native American cultures and religions that S. 2269 and its predecessor bill seeks to remedy. These government-sponsored actions were not confined

to enrolled members of federally-recognized tribes, but were rather aimed at all native peoples, adults and children, men and women, without regard to their tribal affiliation.

Because these federal actions relating to the free exercise of religion by one group of Americans are so unequalled in this nation's history, one does not find any clear guidelines in prior rulings of the Supreme Court as to how a statute that is designed to remedy a past and pervasive pattern of discrimination would be construed within the context of First Amendment jurisprudence.

There is the additional challenge presented by the fact that historically, native people have not separated religion from culture. Research clearly indicates that amongst all native people, the concepts of religion and culture are inextricably intertwined.

The Justice Department has advised the Committee that it is constitutionally permissible to establish protections for the exercise by Native Americans of their traditional cultural practices, but that to the extent such practices also encompass religious practices and thereby implicate First Amendment considerations, religious protections can only be extended to "federally-recognized tribes or their designees".

S. 2269 was drafted with these distinctions in mind: (1) that the federal government's discrimination against Native American traditional cultural and religious practices was exercised against individuals and did not follow a line defined by the federally-recognized tribal status; and (2) that protections afforded to the traditional cultural and religious practices of native peoples, including California Indians and Native Hawaiians, must be extended within a cultural context. The definitions contained in S. 2269 are designed to draw these distinctions so that the remedial nature of the statute might rest upon a constitutionally-permissible foundation.

SUMMARY OF MAJOR PROVISIONS OF S. 2269, AS AMENDED

For many Native Americans, traditional religions and ceremonies are the essence of Native American culture and existence. S. 2269 recognizes the importance of traditional cultural practices and spiritual beliefs to Native Americans, and embraces the concept that religion is deeply intertwined with the very fabric of Native American cultural identity and ways of life, and that because Native American traditional cultural practices are so intertwined with religious practices, and because the spiritual beliefs and traditional ceremonial practices of Native Americans are such an integral part of life itself, culture and religion cannot be separated.

S. 2269 does not amend the American Indian Religious Freedom Act (AIRFA) enacted into law in 1978, but translates the policy established in AIRFA into specific standards for government action and provides a right of action in federal district court should any of the rights protected by the Act be violated.

S. 2269, as amended addressed Native American cultural and religious practices in three areas: sacred sites, prisoners' rights and use of eagle feathers and other animals and plants.

Title I—Protection of Native American sacred sites

Title I specifically provides protection of Native American sacred sites, by authorizing federal agencies to plan and manage their

lands in ways that are consistent with Native American sacred sites, and putting into place a mechanism for resolving disputes.

With regard to sites sacred to practitioners of Native American religions, Title I addresses issues of access (Section 102), federal land management and notice of impending projects (Section 103), consultation with Native Americans (Section 104), administrative and judicial remedies (Sections 105 and 401), confidentiality (Sections 104(b), 105(b), 108 and 109(b)), regulation of sacred sites on Indian lands (Section 106), and criminal sanctions for the intentional destruction of known sacred sites (Sections 109 (a) and (c)).

Scope of the act / definitions

Most of the provisions of Title I are triggered when a covered federal activity may have an adverse impact upon a Native American sacred site. Thus, the definitions of three terms are critical to the application of this Act: (1) covered federal activity, (2) adverse impact, and (3) Native American sacred site.

"Covered federal activity" is defined to include new or re-authorized projects by federal agencies, including new phases of existing projects, but does not cover ongoing and continuing projects that have been the subject of final decision and where substantial funding or implementation has taken place.

In the case of public lands, activities engaged in or funded by a federal agency which may impact on those lands would be covered except for certain routine activities, such as maintenance, and federal loans to private entities. Federal agency activities on State lands would also be covered except that if the only federal connection is a de minimis amount of federal funding, this would not be sufficient to characterize the activity as federal. Coverage of federal activities on private and Indian lands is much more limited. Only activities involving federal highway funds, licensing by the Federal Energy Regulatory Commission or the Nuclear Regulatory Commission, and toxic and transuranic disposal siting activities would be covered on private and Indian lands.

"Adverse impact" is defined as action which would desecrate, destroy or substantially alter or disturb a sacred site or which would substantially burden the free exercise of a Native American religions or inhibit, interfere or infringe upon traditional cultural ceremonies or rituals which are conducted at a sacred site.

"Native American sacred site" is defined as a feature or area which is sacred by reason of both the traditional practices or ceremonies associated with it and its significance to those practices or a Native American religion.

States are not subject to the notice, consultation or planning processes in the Act unless the State is regulating an activity pursuant to a delegation of authority from or approval by a federal agency.

Tribal governmental activities with no federal nexus would not be covered by the Act. Trial government activities with a federal nexus, even where the nexus is only federal funding (which is the case for most tribal programs), would trigger the application of the Act in the same manner that other activities with a federal role would be covered, namely that the federal agency involved would need to comply with the Act and could be sued to prevent it from

funding or approving the offending activity. However, if the tribe has its own law providing for the free exercise of religion, the tribal law preempts a federal cause of action in the circumstances where there is both a federal and tribal government role and remedies exist through tribal judicial forums.

Access

The access provision is designed to ensure that Native American practitioners have access to their sacred sites on public lands as needed for the performance of ceremonial duties or activities associated with such sites. Often, Native American religions require that certain ceremonies be performed at specific sites at specified times or that certain natural materials be obtained from specific areas. Sometimes these ceremonial requirements are known in advance, but at other times the need to perform a ceremony may arise quite suddenly (such as ceremonies associated with death).

This section would provide a right of access except in certain specified circumstances where access would negatively impact upon national security, ecosystems, wildlife and habitat (including the implementation of the Endangered Species Act) or would present an immediate threat of bodily harm or serious harm to the environment. In such cases, restrictions upon access must be narrowly tailored, reasonable and used as a last resort.

The access provisions provide authority for, but do not require, federal land managers to close certain areas of land to public use for limited periods of time to protect the privacy of cultural or religious ceremonies associated with a sacred site. Currently, some land managers believe that they do not have the authority to close off land for this purpose. This provision makes clear that such authority may be delegated to land managers.

Federal land management

This section would fully incorporate Indian tribes, Native Hawaiian organizations and Native American traditional leaders into land management procedures at each stage of the planning process. Indian tribes and Native Hawaiian organizations will provide notice to the Secretary of the Interior as to all land to which they have aboriginal, historic, cultural or religious ties. During the initial over-all planning stage, federal agencies would be required to consult with tribes, Hawaiian organizations and traditional leaders at the earliest possible time in the planning process. Where requested by Indian tribes or Native Hawaiian organizations, the federal agency would enter into negotiations with those tribes or Hawaiian organizations regarding how sites sacred to the tribes or Native Hawaiians would be managed. As part of this planning process, the agencies will consult with the Secretary of the Interior to identify Indian tribes, Native Hawaiians, or Native American traditional leaders with aboriginal, historic, cultural or religious ties to certain areas of land and also contact tribes and Native Hawaiian organizations directly to determine if there are land areas in which they have a particular interest. All of these provisions are designed to prevent disputes by dealing with potential problems during the initial planning processes pertaining to specific areas of land.

Notice and consultation

In terms of specific projects, the federal agencies are to consult with relevant Indian tribes, Native Hawaiian organizations and traditional leaders and, in addition, provide formal notice to those that have been identified through the planning process as having an interest in the affected land.

In order to allowed time for a full investigation of the potentially adverse impact a covered federal activity may have on a sacred site, for a 90 day period after notice is provided, no action to approve or commence the proposed activity may be taken, and consultation efforts must continue during this period. If an Indian tribe, Hawaiian organization or Native American traditional leader objects to the proposed activity and the government agency makes a threshold determination that there may be a valid claim that an adverse impact exists, a more formal consultation process is triggered, during which time no action may be taken to approve or commence the activity. If that consultation is successful, then the agreed-upon protections for the sacred site will take effect. In the case of Indian tribes or Native Hawaiian organizations, this may take the form of a formal sacred sites protection agreement. If consultation is unsuccessful, the agency must then prepare a document analyzing the impact of the activity on the site, the nature of the government's interest and whether that interest needs to be met in the manner proposed.

In some traditional cultures, there are strict secrecy requirements. Where an Indian tribe or Native Hawaiian organization certifies that this is the case, the tribe or organization need not reveal information about the location of the sacred site or its use. In these instances, the burden on identifying appropriate alternatives to the action is placed upon the tribe or Native Hawaiian organization, since the federal agency would not have sufficient information in these cases to identify or review alternatives itself.

Administrative and judicial remedies

To resolve situations where consultation is unsuccessful, the Act requires each agency to establish an administrative review process which must first be utilized if an Indian tribe, Native Hawaiian organization or Native American practitioner is aggrieved by reason of an adverse impact on a sacred site. The legal test in the administrative proceeding and in a judicial proceeding, if a suit is ultimately filed, is the same. Where an Indian tribe, Native Hawaiian organization, Native American traditional leader or Native American practitioner (the latter categories are defined and recognized by the tribe or tribal community) can establish that an activity will have an adverse impact on a site, the government must show that it has a compelling interest and there is no less restrictive alternative in order to proceed. This is similar to the test in the Religious Freedom Restoration Act.

The only exception to this rule, is in the case where a secrecy certification is made by an Indian tribe or Native Hawaiian organization. In that circumstance, there shall be no burden placed upon the practitioner to demonstrate the nature of the adverse impact upon the site, rather the government agency must show a compelling interest when such a certification is made. The least restrictive

alternative part of the test is deemed to be met, however, if no reasonable alternatives have been identified through the consultation process as described above.

Confidentiality

In most Native American cultures, the confidentiality of certain religious and ceremonial information is very important. In the most extreme cases, where any release of information is forbidden, tribes and Native Hawaiians may invoke the secrecy provisions described above. However, in all cases under this Act, information that is provided pertaining to a cultural practice or religion or a sacred site is not to be revealed to the general public, including under the Freedom of Information Act. Knowing release of such information is deemed to constitute a criminal offense.

Criminal sanctions

The Act provides for criminal penalties where a person or organization intentionally damages a site that is known to be scared and intentionally releases information knowing that it is confidential.

Title II—Prisoners' right

This section requires prisons to treat Native American religions in an manner equal to that afforded to other religions. In essence, this section provides a method for implementing an already existing requirement of equal protection. This section merely defines what is needed to ensure that the unique needs of Indian religions are considered in a manner that ensures substantive equality and not merely formalistic equality. Thus, in determining what is required for equal treatment, it makes clear that prison authorities must recognize the legitimacy of Native spiritual leaders, special religious facilities such as sweat lodges and materials needed for various ceremonies. Conversely, access to an all-faith chapel and prison chaplain would not normally constitute equal treatment.

This section also requires the Attorney General, in consultation with Native American traditional leaders and ex-offenders, to study the status of Native prisoners with regard to their religious practices and issue a report within 3 years.

Title III—Religious use of eagles and other animals and plants

This section would reform the current system for distributing eagle feathers and other parts to Native Americans for religious purposes, authorized by the Bald And Golden Eagle Protection Act, in a manner similar to the April 29, 1994 Executive Order referenced above. This section also delegates to tribal governments the authority to administer the system on their own lands and requires that a mechanism be established to enable tribes to distribute dead eagles found within their reservation boundaries. It also requires a study to evaluate the need for expanding the system to include the distribution of other surplus animals and plants which have sacred value for Native American religious ceremonial use.

LEGISLATIVE HISTORY

S. 2269 was introduced in July 1, 1994 by Senator Inouye and was referred to the Senate Committee on Indian Affairs. The Com-

mittee held a hearing on the bill on July 14, 1994. Upon report, the bill will be sequentially referred to the Senate Committee on Energy and Natural Resources.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On August 10, 1994, the Committee on Indian Affairs, in open business session, considered an amendment in the nature of a substitute to S. 2269 offered by Senator Inouye. The bill, as amended, was ordered reported with a recommendation that the bill, as amended, do pass.

SECTION-BY-SECTION ANALYSIS OF S. 2269, AS AMENDED

Section 1. Short title

Section 1 cites the short title of the Act as the "native American Cultural Protection and Free Exercise of Religion Act of 1994".

Section 2. Policy

Section 2 provides that it shall be the policy of the United States, in furtherance of the policy established in the "Joint Resolution American Indian Religious Freedom," approved in 1978, to protect and preserve the cultural patrimony and the inherent right of Native Americans to believe, express, and exercise his or her traditional religion, including, but not limited to, access to any Native American religious site, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

Section 3. Definitions

Section 3 defined terms set forth in the Act, including the terms adverse impact, aggrieved party, consultation, covered federal activity, federal agency, governmental agency, Indian, Indian lands, Indian tribe, land(s), Native American, Native American practitioner, Native American religion, Native American sacred site, Native American traditional culture, Native American traditional leader, Native Hawaiian, Native Hawaiian organization, public land and State.

Title I—Protection of sacred sites

Section 101. Findings

Section 101 sets forth Congressional findings in support of the proposed Act, emphasizing that—

(1) the Congress has the authority to enact laws that assure the protection and preservation of Native American cultures and religions based upon treaties, the special trust relationship and Section 8, Article 1, of the United States Constitution and the First and Fourteenth Amendments;

(2) the United States Constitution vests the Congress with the authority to regulate commerce with Indian tribes and individual tribal Indians composing those tribes;

(3) the treaty-making power provides the Congress with the authority to enact statutes to carry out treaties and agreements;

(4) the Congress has the authority to enact a law consistent with policies established through existing legislation, federal

court rulings and executive orders which protect the religious and cultural practices of Indian people;

(5) European settlers and the federal government have a history of ascribing European concepts of religion and religious beliefs to the cultural practices and religious beliefs of native peoples and of suppressing the free exercise of traditional ways by native peoples;

(6) the United States' policy toward and treatment of the cultural practices of native peoples has included allocating funds to religious groups to civilize and christianize native peoples, authorizing the military and the courts to incarcerate, starve and murder native peoples caught practicing their traditional cultural and religious ceremonies, establishing government and denominational schools and forcibly removing children from their families to attend such schools, punishing native peoples for speaking their language and wearing their hair in a traditional manner, removing by force native peoples from their traditional homelands, requiring native peoples to dissolve traditional tribal theocratic governments and adopt secular tribal government systems, prohibiting traditional cultural and religious practices thereby forcing Native Americans to conduct these activities in secret, denying access to and endangering sacred sites located on public and federal lands that were once considered the traditional homelands of native peoples, and managing public lands in a manner that does not accommodate access to sacred sites by Native Americans or provide for the protection of sacred sites from being destroyed or desecrated;

(7) cultural and religious practices are integral to and inseparable from Native American cultures and communities;

(8) it is the responsibility of the United States to remedy the historical and pervasive pattern of discrimination against the cultural practices of native peoples;

(9) the protection of Native American traditional cultures and religions is part of the treaty relationship and trust responsibility of the federal government;

(10) Native American cultures and religions are diverse, very significantly from one Native American group to another and existed long before the establishment of the United States;

(11) access to and the protection of sacred sites located on public lands will not burden other uses of public lands;

(12) the government-to-government relationship permits the United States to protect the integrity of Indian tribes and Native American cultures;

(13) certain lands are sacred to Native American cultures and those sites must be protected;

(14) sacred sites are an integral and vital part of Native American cultures and religious ceremonies;

(15) the gathering and use of natural substances is integral and vital to Native American cultures and religions;

(16) governmental land use decisions impede Native American cultural and religious practices;

(17) the lack of privacy and isolation inhibits the practice of many Native American cultural and religious practices which require privacy;

(18) there are cultural and religious tenets among Indian tribes and Native Hawaiians which mandate secrecy and prohibit disclosure of information concerning their sacred sites, beliefs and practices;

(19) there is an absence of a coherent federal policy for the protection of Native American sacred sites;

(20) the United States Supreme Court has deprived Native American religious practices of First Amendment protection through its decision in *Lyng* v. *Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988);

(21) the *Lyng* decision creates a chilling and discriminatory effect on Native American cultures and the free exercise of Native American religions;

(22) although the Congress has enacted laws which regulate and restrict the discretion of federal agencies for the sake of environmental, historical, economic and cultural concerns, the Congress has never enacted a judicially enforceable law to address the impact of land use decisions upon the practices of Native American traditional cultures and religions; and

(23) the lack of a judicially enforceable law and coherent federal policy imposes unequal burdens on Native American cultures and religions and impairs the vitality of Indian tribes, tribal communities and Native Hawaiian communities.

Section 102. Access to Federal lands

Section 102(a) provides for a right of access by Native American practitioners to public lands for cultural, ceremonial or religious purposes, including the right to gather natural materials for cultural purposes.

Section 102(b) allows federal agencies to take measures to assure that access and use of lands does not negatively impact national security, the Endangered Species Act, ecosystems, wildlife or habitats, or cause serious harm to any person or the environment, however, before access is restricted other feasible means that would avoid these impacts must be utilized.

Section 102(c) allows federal agencies, when practicable, to consult with those seeking access to public lands and those occupying the public lands who may be affected by the access, and to include in a memorandum of agreement the terms of the access.

Section 102(d) places a limitation on the use of motorized vehicles in roadless areas where they are prohibited.

Section 102(e) empowers, but does not require, federal land managers to close certain areas of land to public use for limited periods of time to protect the privacy of cultural, ceremonial or religious activities, and makes clear that such authority may be delegated to land managers.

Section 103. Federal land management; identification of lands, planning and notice

Section 103(a) requires federal agencies to manage lands under their jurisdiction in compliance with the Act.

Section 103(b)(1)(A) requires the heads of federal land managing agencies, in conjunction with the Secretary of the Interior, tribal governments and Native Hawaiian organizations, to identify land

areas to which tribes or Native Hawaiians have aboriginal, historic, cultural or religious ties for the purpose of determining whether a federal activity will have an adverse impact on a sacred site, cultural or religious practice.

Section 103(b)(1)(B) requires Native Hawaiian organizations to notify the Secretary of their desire to receive notice of federal activities within 90 days after the Act is enacted.

Section 103(b)(2)(A) requires the Secretary of Interior, within 90 days after passage of the Act, to contact tribes and Native Hawaiian organizations to obtain descriptions of lands they desire notification on regarding federal activity and to disseminate those land descriptions to all federal agencies.

Section 103(b)(2)(B) provides that Indian tribes and Native Hawaiian organizations may notify the Secretary that their sacred sites are subject to the secrecy provisions of the Act.

Section 103(b)(3) requires the Secretary, within 18 months after the Act is enacted, to compile and make available to federal agencies a list which identifies all Indian tribes, Native Hawaiian organizations and land areas for which notice is to be given regarding federal activities.

Section 103(b)(4) requires federal land managing agencies to research their own sources to collect information on Native American sacred sites that may be affected by federal activities on lands they manage, and to identify and notify Indian tribes, Native Hawaiian organizations and traditional leaders who may have an interest in the proposed activities.

Section 103(b)(5) authorizes federal agencies, tribal governments or Native Hawaiian organizations to conduct an ongoing process to supplement the process required by this subsection.

Section 103(c) requires federal agencies involved in land management activities to: (1) consult with Indian tribes, Native Hawaiian organizations, and Native American traditional leaders who have an interest in the land in question; (2) provide notice to an Indian tribe or Native Hawaiian organization of all covered federal activities which may have an impact on sacred sites located on lands the tribe or organization has specified in writing that it has a direct interest in; (3) ensure that its land management plans are consistent with the provisions of the Act; and (4) maintain the confidentiality of the details of a Native American culture or religion or the significance of a sacred site to that culture or religion.

Section 103(d)(1) requires a governmental agency before proceeding with a federal activity that may adversely impact a Native American sacred site, cultural practice or religion to consult with Indian tribes, Native Hawaiian organizations and Native American traditional leaders, and to send a written notice containing a geographical description and map of the lands affected, and a description of the proposed action to each tribe, organization or traditional leader identified pursuant to this section or known by the agency to have an interest in the land affected by the proposed activity.

Section 103(d)(2) requires the governmental agency to document its effort to provide Indian tribes, Native Hawaiian organizations and Native American traditional leaders with information required by this section or any applicable regulations, guidelines or policies.

Section 103(e)(1) give an Indian tribe, Native Hawaiian organization or Native American traditional leader 90 days after receiving notice pursuant to subsection (d) or within the time limit of any comment period permitted or required by any applicable federal law, whichever is later, to provide written notice to a governmental agency if a proposed federal activity may have an adverse impact on a Native American sacred site or a cultural or religious practice associated with that site.

Section 103(e)(2) allows the time period to be modified by the agency, request of a noticed party, or a negotiated agreement pursuant to section 104(a)(3)(B).

Section 103(e)(3) specifies that an Indian tribe, Native Hawaiian organization or Native American traditional leader is not required to respond to any notice under this section.

Section 103(e)(4) allows for additional information to be provided to the agency regarding Native American traditional leaders or practitioners who should be included in the notice and consultation requirements of this section and section 104.

Section 103(f)(1) prohibits a governmental agency from approving, commencing or completing an activity subject to this section for a period of 90 days following the date on which notice under subsection (d) is provided to Indian tribes, Native Hawaiian organizations or traditional leaders, unless (A) the period of consultation under section 104 is completed; (B) a sacred sites protection agreement has been entered into pursuant to section 104(a)(3)(B); or (C) all parties entitled to notice consent to a shorter time period.

Section 103(f)(2) permits governmental agencies to continue with planning, studies or other preparatory matters during the notice and consultation periods under sections 103 and 104 provided that these activities do not constitute a commitment to proceed with the activity or project.

Section 103(f)(3) requires governmental agencies to continue to consult with potentially affected Indian tribes, Native Hawaiian organizations and traditional leaders during the 90 day period following formal notice to the tribes, organizations and traditional leaders.

Section 104. Consultation

Section 104(a)(1) requires the local land manager or the Secretary of the department whose land is involved to discontinue a federal activity until the consultation and assessment process authorized in paragraphs (3) and (4) are performed and to make a determination of whether or not an adverse impact exists when a tribe, Native Hawaiian organization or traditional leader notifies the agency in writing within the 90 day notice period pursuant to section 103(e), or within the time limit of any comment period permitted or required by any applicable federal law, whichever is later.

Section 104(a)(2) provides that if a federal activity is already underway, and (A) an agency becomes aware that it may adversely impact a sacred site, the activity must be discontinued until the duties described in section 103 (d) and (f) are performed; or (B) a Indian tribe or Native Hawaiian organization that did not receive notice or know of the activity becomes aware that it may adversely

impact a sacred site and notifies the agency, and the Secretary of the department or local land manager makes a determination that an adverse impact exists, the activity must be discontinued until the duties in paragraphs (3) and (4) are performed.

Section 104(a)(3)(A) requires the governmental agency to consult with aggrieved parties concerning the nature of the adverse impact and the alternatives that would minimize or prevent the adverse impact, including any alternatives identified in written objections filed under this subsection.

Section 104(a)(3)(B)(i) requires federal agencies, if requested by an Indian tribe or Native Hawaiian organization, to enter into negotiations to identify land management procedures that protect and avoid adverse impacts on sacred sites located on lands within their jurisdiction; and authorize agencies to enter into sacred sites protection agreements with Indian tribes or Native Hawaiian organizations, which may supersede the planning, notice, consultation and access provisions of the Act and delegated land management responsibilities to tribes or organizations for lands described in the agreement.

Section 104(a)(3)(B)(ii) provides that Indian Self-Determination Act procedures and regulations may be used in agreements with Indian tribes.

Section 104(a)(4) requires governmental agencies, when claims by an aggrieved party are not resolved, to prepare and make available to tribes, Native Hawaiian organizations or traditional leaders involved in the consultation process a document which includes (A) the adverse impact identified by the aggrieved party, (B) an assessment of whether the government's interest in proceeding with the action is compelling; and (C) an assessment of whether the activity is the least restrictive means of furthering that interest; and requires agencies that commence activities despite notice from an aggrieved party to issue a written opinion regarding its decision which will serve as the final agency action for purposes of judicial and administrative review.

Section 104(a)(5) authorizes the analysis required by this section to be incorporated into documents prepared in compliance with other related federal statutes.

Section 104(b)(1) allows tribal governments or Native Hawaiian organizations to invoke protection under this subsection by certifying that their cultural or religious tenents mandate secrecy and prohibit disclosure of information concerning their sacred sites, or cultural or religious beliefs or practices.

Section 104(b)(1)(A) makes clear that tribal governments or Native Hawaiian organizations invoking this subsection are not required to reveal any information concerning their sacred sites, or cultural or religious beliefs or practices.

Section 104(b)(1)(B) provides that tribal governments or Native Hawaiian organizations invoking this subsection are not required to explain why an alternative is or is not less intrusive than the original activity upon the site, or cultural or religious practice associated with the site.

Section 104(b)(1)(C) makes clear that when this subsection is invoked governmental agencies are not required to include an analysis of the adverse impacts upon or use of a site, or the cultural or

religious practices or beliefs in the consultation process or any document required by the Act.

Section 104(b)(2) requires governmental agencies to consult with Indian tribes or Native Hawaiian organizations providing certification under this subsection, consider any alternatives offered by tribes or organizations, and to allow tribes or organizations to review alternatives proposed by the governmental agencies.

Section 104(b)(2)(C) requires governmental agencies, when claims by tribes or Native Hawaiian organizations are not resolved, to prepare and made available to the tribes or organizations a document which includes (A) an assessment of whether the government's interest in proceeding with the action is compelling; (B) an assessment of whether the activity is a reasonable means of furthering that interest; and (C) reasons why the identified alternatives are not reasonable; and requires agencies that commence activities despite notice from an aggrieved party to issue a written opinion regarding its decision which will serve as the final agency action for purposes of judicial and administrative review.

Section 104(c) makes clear that the provisions of subsection (b) control in all circumstances when invoked.

Section 104(d) gives governmental agencies 30 days to disclose and make available to aggrieved parties all plats, maps, plans, specifications, studies, comments and information in the agency's possession which relates to activity, except for (i) attorney work product; (ii) proprietary or business information; (iii) confidential information; and (iv) information which would jeopardize the litigating position of another tribe.

Section 104(e) specifies that the governor of the pueblo or the governor's designee is the party with standing to file an objection, participate in consultation, or file an action under section 105 or 401 in cases where federal activities adversely impact the pueblos of New Mexico or their sacred sites.

Section 104(f) provides that sections 103 and 104 do not apply, if the governmental agency determines that the process will (1) directly affect national security, the Endangered Species Act; (2) cause serious harm to any person or the environment; or (3) interfere with law enforcement activities.

Section 105. Administrative procedures

Section 105(a) directs governmental agencies to establish administrative procedures to implement the requirements of Title I.

Section 105(b) requires aggrieved parties to exhaust administrative remedies before filing an action pursuant to section 401.

Section 105(c)(1) places the burden on aggrieved parties to establish that the federal activity is or will have an adverse impact on a Native American sacred site, with the exception of subsection (d) of this section.

Section 105(c)(2) provides that, if the aggrieved party meets its burden of proof, the agency may proceed only if it is determined by a preponderance of the evidence that the activity (A) furthers a compelling governmental interest; and (B) is the least restrictive means of furthering that interest.

Section 105(c)(3) states that the governmental agency's determination is final for purposes of judicial review under section 401.

Section 105(d)(1) provides that in cases where tribes or Native Hawaiian organizations invoke section 104(b) the governmental agencies must prove by a preponderance of the evidence that the activity (A) furthers a compelling governmental interest; (B) is a reasonable means of furthering that interest; and (C) the alternatives identified under section 104(b)(2) are not reasonable.

Section 105(d)(2) states that the agency's determination is final for purposes of judicial review under section 401.

Section 105(e)(1) specifies that a governmental agency retains its burden of proof at all stages of any proceeding or process.

Section 105(e)(2) prohibits a governmental agency from proceeding with an activity if it does not meet its burden of proof.

Section 105(e)(3) states that the burden of proof means the burden of production and persuasion for purposes of this section.

Section 105(f) provides that (1) a finding of adverse impact does not require a person to be coerced to act contrary to religious beliefs or cultural practices and includes disturbing the integrity of a sacred site; (2) land management activities are considered an adverse impact if they interfere with or make more difficult a cultural or religious practice; and (3) ownership of land by the government is not a compelling government interest.

Section 105(g) allows Native American practitioners to provide testimony about their beliefs in camera.

Section 106. Native American sacred sites on Indian lands

Section 106(a) permits Indian tribes to regulate and protect sacred sites located on Indian lands and emphasizes that the Act does not affect the existence, scope or application of tribal jurisdiction or tribal law concerning the free exercise of religion or the protection of or access to sacred sites on Indian lands, and does not grant authority to one Indian tribe to regulate sacred sites within the jurisdiction of another tribes or on lands not within their jurisdiction.

Section 106(b) obligates governmental agencies to notify Indian tribes of federal activities on Indian lands that may have an adverse impact on a sacred site.

Section 106(c) precludes the provisions of this section from applying if national security concerns are affected by a federal activity.

Section 106(d)(1) requires the Secretary, at the joint request of the affected tribes, to convene a committee of tribal representatives to enter into negotiations concerning the adverse impacts and alternatives that prevent those adverse impacts when a federal activity on the lands of one tribe results in changes to a sacred site of another tribe, and when a free exercise of religion claim is not covered by the scope of the Act.

Section 106(d)(2) specifies that the committee shall consist of and be selected by representatives of the tribe or tribes whose sacred site is affected and the tribe on whose land the site is located.

Section 106(e)(3) provides that the committee is to be convened for the duration of the consultation and negotiation period and is to meet at the request of the tribe or tribes whose sacred site is affected and the tribe on whose land the site is located.

Section 107. Application of other laws

Section 107(a) makes clear that the rights to notice, comment and participation in other laws, regulations, guidelines, or policies of Federal, State, and tribal governments are not limited by the Act.

Section 107(b) requires the Act's procedures to be integrated into existing federal land management procedures and decision-making processes wherever possible.

Section 108. Confidentiality

Section 108(a) prohibits the release of information obtained from proceedings under section 105 or 401 or consultation under sections 103 and 104 which pertain to the details of a cultural practice or religion or the significance or location of a sacred site.

Section 108(b) requires the governmental agency or court to supplement the record with the results or conclusions of the administrative proceeding or judicial review process in order for interested parties to understand the basis for a decision.

Section 108(c) specifies that this section does not apply where the parties waive its application or where a Native Hawaiian organization is seeking information about a site for the purposes of protecting that site.

Section 108(d) recognizes the right of Indian tribes and Native Hawaiian organizations to seek redress through existing laws that require certain information to be withheld from the public.

Section 109. Criminal sanctions

Section 109(a) imposes (1) a $10,000 fine and/or 1 year prison sentence for an initial violation, and (2) a $100,000 fine and/or 5 year prison sentence for subsequent violations against any person who intentionally damages or destroys a known sacred site located on land defined in section 3(10).

Section 109(b) imposes (1) a $10,000 fine and/or 1 year prison sentence for an initial violation, and (2) a $100,000 fine and/or 5 year prison sentence for subsequent violations against any person who intentionally releases information knowing that it is required to be kept confidential by the Act.

Section 109(c) imposes a $200,000 fine for a first offense and a $500,000 fine for a second offense against organizations for violations of subsection (a) or (b).

Title II—Prisoners' rights

Section 201. Rights

Section 201(a)(1) ensures that Native American prisoners who practice a Native American religion will have access to (A) traditional leaders, (B) items and materials used in religious ceremonies, and (C) religious facilities on a basis equal to that afforded other prisoners who practice other religions.

Section 201(a)(2) requires prison authorities to treat items and materials (including traditional foods) identified by a Native American traditional leader and used in religious ceremonies in the same manner as religious items and materials used in other religions.

Section 201(a)(3)(A) permits Native American prisoners to wear their hair according to the customs of a Native American religion if they can demonstrate that (i) the practice is rooted in Native American religious beliefs, and (ii) the beliefs are sincerely held.

Section 201(a)(3)(B) provides that a prisoner's request may be denied only where prison authorities can satisfy the criteria of Section 3 of the Religious Freedom Restoration Act.

Section 201(a)(4) describes religious facilities as sweat lodges, tepees and other secure locations within the prison grounds if requested by a Native American traditional leader to facilitate a religious ceremony.

Section 201(a)(5) prohibits penalizing or discriminating against Native American prisoners on the basis of religious practices, and extends all prison and parole benefits or privileges for engaging in religious activity to Native American prisoners who participate in Native American religious practices.

Section 201(a)(6) states that this title neither (A) requires nor prohibits prison authorities from permitting access to peyote or Native American sacred sites; nor (B) alters the requirements for exhausting administrative remedies.

Section 201(b)(1) requires the Attorney General, in consultation with Native American traditional leaders, ex-offenders with corrections experience and prison administrators, to investigate the conditions of Native American prisoners relative to their ability to practice their religious ceremonies.

Section 201(b)(2) Requires the Attorney General to submit to the Congress, within three years after enactment of the Act, a report containing (A) an assessment of the recognition, protection and enforcement of the rights of Native American prisoners to practice their religions under the Act; and (B) recommendations for regulations to implement the Act.

Title III—Religious use of eagles and other animals and plants

Section 301. Religious use of eagles

Section 301(a) gives the Director of the U.S. Fish and Wildlife Service one year after enactment of the Act to develop, in consultation with Indian tribes and traditional leaders, a plan that—

(1) ensures prompt disbursement of eagles, their parts, nests or eggs for religious use by Indians;

(2) provides an adequate number of eagles to meet a demonstrated need where eagles are available due to accidental or natural deaths, or takings permitted by federal law;

(3) simplifies and shortens the permit process to authorize the taking, possession, and transportation of eagles, their parts, nests or eggs for religious use by Indians;

(4) establishes a mechanism for Indian tribes to distribute dead eagles found within their reservation boundaries; and

(5) establishes a mechanism for tribes to communicate with U.S. Fish and Wildlife Service Offices.

Section 302. Other animals and plants

Section 302 requires the development of administrative procedures, in consultation with Indian tribes and Native Hawaiian or-

ganizations, that govern the disposition of surplus wildlife and plants and increase the availability of natural products to Native American religious practitioners within 2 years after enactment of the Act.

Title IV—Jurisdiction and remedies

Section 401. Jurisdiction and remedies

Section 401(a)(1) provides aggrieved parties with the right to file suit against the United States or a State to enforce the provisions of the Act.

Section 401(a)(2) grants jurisdiction to Federal courts over civil actions for equitable relief or damages to remediate harm to sacred sites.

Section 401(a)(3) makes clear that the jurisdiction that Indian tribes have under Section 106 or any federal law is not disturbed.

Section 401(b)(1) precludes the court from deferring to the factual findings of the agency except where the findings are based on a formal hearing on the record.

Section 401(b)(2) requires a de novo review by the court of agency legal determinations pertaining to adverse impacts and whether the government's interest in compelling and an alternative is the least restrictive.

Section 401(c) provides that for actions brought under title I and consistent with Section 106 of the Act—(1) the aggrieved party (with the exception of subsection (d)) has the burden of proving that a Federal activity or State action is or will have an adverse impact on a sacred site; (2) if the aggrieved party meets its burden of proof, the agency may proceed only if it is determined by the preponderance of the evidence that the federal activity (A) furthers a compelling government interest; and (B) is the least restrictive means of furthering that compelling interest; (3) for decisions pursuant to title I (A) a finding of adverse impact does not require that an aggrieved party be coerced to act contrary to religious beliefs and may include disturbing the integrity of a sacred site; (B) land management activities are considered an adverse impact if they interfere with or make more difficult a cultural or religious practice; and (C) ownership of land by the government is not a compelling government interest.

Section 401(d) provides that if an Indian tribe or Hawaiian organization relies on section 104(b) and objects to the Federal activity or State action, the governmental agency has the burden of proving by a preponderance of the evidence that the activity (1) furthers a compelling government interest; (2) is a reasonable means of furthering that interest; and (3) the alternative identified under section 104(b)(2) are not reasonable.

Section 401(e)(1) provides that the governmental agency retains its burden of proof at all stages of any proceeding or process.

Section 401(e)(2) provides that a governmental agency shall not proceed with an activity if it does not meet its burden of proof.

Section 401(e)(3) provides that the burden of proof means the burden of production and persuasion.

Section 401(f) permits Native American practitioners to provide testimony about their beliefs in camera.

Section 401(g) provides that the sovereign immunity of the United States, a State or the immunity derived from the Eleventh Amendment is waived and cannot serve as a bar or defense to any civil action brought to enforce the provisions of the Act, including any grant of attorney fees.

Section 401(h) entitles a prevailing party to attorney's fees, expert witness fees and costs.

Title V—Miscellaneous

Section 501. Savings clause

Section 501(a) makes clear that nothing in this Act is intended to affect or diminish (1) the inherent rights of Indian tribes; (2) the rights of Indian tribes under treaties, statutes or Executive Orders; (3) the right of native Americans to maintain the integrity of their culture and religions; (4) the United States' trust responsibility legal obligation or remedy therefrom; (5) the right of tribes to determine whether another tribe or Native American practitioner has property rights in or can prohibit Federal activities affecting sacred sites located on their lands; (6) any person's cultural or religious claim not covered by the Act; (7) the right of Native Americans to obtain protection or the responsibility of any government agency to provide protection for sacred sites and cultural or religious practices under any federal, state or tribal law or constitution; and (8) the authority of federal land managers to notify and consult with religious and cultural groups not covered by the Act.

Section 501(b) provides that this Act is not limited by nor does it limit the rights under the Religious Freedom Restoration Act, including that Act's application to activities which adversely impact a sacred site.

Section 502. Severability

Section 502 provides that, if any part of this Act is found to be unconstitutional or inoperative, the remaining parts of the Act shall remain in full force and effect.

Section 503. Authorization of appropriations

Section 503 authorizes such appropriations as may be necessary to implement the Act, including sums necessary for consultations provided for in section 201(b)(1).

Section 504. Regulations

Section 504(a) directs land managing agency heads, in consultation with tribes and Hawaiian organizations, to promulgate regulations relating to (1) federal planning processes concerning the management, use or preservation of land; and (2) notice and consultation with tribes, Native Hawaiian organizations and traditional leaders required by Sections 103 and 104 of this Act.

Section 504(b) requires consultation with the Secretary of the Interior to assure consistency in the regulations.

Section 504(c) requires the regulations to be flexible enough to address the needs of tribes, Native Hawaiian organizations, and Native American traditional leaders and practitioners, and pro-

vides that the notices and procedures required under sections 103 and 104 need not wait completion of the regulations.

Section 505. Protections

Section 505(a) provides that only those persons described in subsections (7), (11), (12), (16) and (17) of section 3, and members of Indian tribes defined in section 3(9) are afforded the protections of the Act.

Section 505(b) authorizes the Secretary to consult with Indian tribes, Native Hawaiian organizations, and Native American practitioners and traditional leaders to determine the bona fide nature of those persons defined in section 3, or the nona fide nature of a traditional culture practice or religion.

Section 506. Application of Federal Advisory Committee Act

Section 506 exempts the Act from the requirements of the Federal Advisory Committee Act.

Section 507. Effective date

Section 507(a) provides that the Act is effective immediately upon enactment, enforcement does not depend upon the promulgation of government regulations, and requires agencies to establish applicable procedures 6 months following passage of the Act.

Section 507(b) states that federal agencies are not required to reconsider any final action or decision that it made prior to enactment of the Act, except as provided in section 104(a)(2) and section 3(4)(B)(ii), and does not bar application of the Act to new phases of existing projects.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of S. 2269, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 4, 1994.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2269, the Native American Cultural Protection and Free Exercise of Religion Act of 1994, as ordered reported by the Senate Committee on Indian Affairs on August 10, 1994.

CBO estimates that implementing S. 2269 would result in no significant costs to the federal government or to state and local governments. Because enactment of S. 2269 would affect receipts, pay-as-you-go procedures would apply to the bill. We estimate that the effect on receipts would be negligible.

Title I of S. 2269 would establish procedures regarding the protection of Native American sacred sites for various agencies within the Department of the Interior. The bill also would require that the Fish and Wildlife Service develop a plan to distribute among the Indian tribes, for religious purposes, surplus plants and wildlife that have been collected over the years by the federal government.

In addition, S. 2269 would establish criminal sanctions against those who intentionally damage a sacred site or release information required to be held confidential pursuant to this bill. CBO estimates that the distribution plan would cost the federal government less than $100,000 in fiscal year 1995, and that the fines would generate governmental receipts of less than $500,000 per year.

Title II would require that Native American prisoners practicing a Native American religion have access to appropriate religious facilities and materials utilized in religious ceremonies, with the exception of peyote. This would clarify that Public Law 103–141, the Religious Freedom Restoration Act of 1993, applies to Native Americans practicing Native American religions, and does not add to the requirements already mandated by law. Many state prisons, including those in most western states, already allow Native American prisoners access to sweat lodges and religious objects. In addition, the Attorney General would be required to investigate and issue a report regarding the enforcement of the rights of Native American prisoners to practice their religions. Around $100,000 would be spent over three years for the investigation and report.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel Robertson.

Sincerely,

JAMES T. BLUM
(For Robert D. Reischauer, Director).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate require each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2269, as amended, will have minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letters from the Department of Justice and the Department of the Interior, giving the views of the Administration on S. 2269, as amended:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, August 10, 1994.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter provides the views of the Department of Justice on S. 2269, the "Native American Cultural Protection and Free Exercise of Religion Act of 1994." Our comments are limited to legal issues raised by the bill. The Department of Justice defers to the Departments of the Interior, Agriculture, and other Departments with land management responsibilities as to this legislation's desirability in terms of their programs.

We want to note at the outset that, as Department officials have stated on a number of occasions, we strongly support the goals of the bill and want to ensure that federal activities do not unnecessarily interfere with the exercise of traditional tribal religions by

Native Americans. Such protection for Indian religions is welcome and long overdue. Our goals is to help enact effective legislation that will not be mired in lengthy litigation. More important, we want to avoid any adverse rulings on its constitutionality.

In commenting on this bill, we are mindful that the federal government has a unique and special relationship with Indian tribes. This relationship means that, for some purposes, federally-recognized Indian tribes may be singled out for special treatment. These special protections and accommodations, however, remain constrained by the Establishment Clause of the First Amendment. The Department believes that S. 2269, as currently drafted, presents very troublesome Establishment Clause concerns. The problems in the current bill are not beyond repair, however.

Over the past six months, the Department's lawyers have worked closely with the Committee to propose new language for S. 2269 and its predecessor, S. 1021. We appreciate the efforts by Committee staff to address many of these Administration concerns. The Department still has several constitutional and legal concerns. Our lawyers are available to work with the Committee to provide language that would alleviate these remaining concerns.

I. Establishment clause analysis

A. Scope of the protections

The Supreme Court has consistently held that the Establishment Clause prohibits laws that treat one or more religions differently from others. As the Court stated in *Larson* v. *Valente,* 456 U.S. 228, 244 (1982), "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." In light of this concern, the Court generally has applied strict scrutiny in reviewing enactments containing denominational preferences and has invalidated them as violating the Establishment Clause. *See, e.g., id.* at 246–251.

The Court recently reaffirmed this principle and expanded its application in *Board of Education of Kiryas Joel Village School District* v. *Grumet,* 62 U.S.L.W. 4665 (U.S. June 27, 1994). In that case, the Court struck down an enactment creating a school district because the act applied to only one school district, which was entirely composed of members of a particular religious sect (the Satamar Hasidic sect). The basis of the Court's holding was that the Satmar Hasidim received a benefit—the creation of a school district—as a result of a legislative act that applied only to them, rather than "as one of many communities eligible for equal treatment under a general law." *Id.* at 4669. Importantly, Justice Souter's opinion for the plurality found that, although the delegation was to an ostensibly secular entity—"the 'territory of the village of Kiryas Joel,'" *Id.* at 4668—in reality, the school district was designed to include only Satmar Hasidin. The opinion thus looked behind the formal structure of the benefited group and concluded that its organizing principles were religious and, therefore, the delegation of authority at issue gave rise to a violation of the Establishment Clause.

Despite the broad prohibition on denominational preferences, some forms of special religious treatment may be permissible when

the beneficiaries are Indian tribes. Article I, section 8, clause 3 of the Constitution grants Congress the power to "regulate Commerce * * * with the Indian Tribes." As many courts and commentators have noted, this constitutional provision, and the historical relationship between the federal government and the Indian tribes, have created a unique constitutional status for Indian tribes. This special government-to-government relationship empowers Congress to pass some measures that treat Indians specially.

In *Morton* v. *Mancari,* 417 U.S. 535 (1974), the United States Supreme Court ruled that the federal government could give hiring preferences to members of Indian tribes. The analysis that led to this holding was extended to the religious context in two recent circuit court cases, *Peyote Way Church of God, Inc.* v. *Thornburgh,* 922 F.2d 1210 (5th Cir. 1991), and *Rupert* v. *Director, United States Fish and Wildlife Service,* 957 F.2d 32 (1st Cir. 1992). In both cases the court found that, because of the unique relationship between the federal government and Indian tribes, the federal government did not violate the Establishment Clause by giving certain protections to tribal religions and not to any other religions. That is, the courts found that the ordinary prohibition against denominational preferences did not apply in the same way in the context of Indian religions. *See Peyote Way,* 922 F.2d at 1216–17 (finding that strict scrutiny for denominational preference did not apply); *Rupert,* 957 F.2d at 34–35 (same). This reasoning suggests that Congress can enact some measures to protect the exercise of tribal religions without extending those protections to all religions.

The touchstone of all these opinions is the unique relationship between the federal government and federally-recognized Indian tribes. This government-to-government relationship permits legislation to treat Indians specifically; legislation that would otherwise run afoul of the Constitution. The Supreme Court has stated that such preferences for Indians do not rest upon racial classifications but are warranted because of the sovereign nature of federally-recognized tribes. See, e.g., *Morton* v. *Mancari,* 417 U.S. at 554 ("The preference, as applied, is granted to Indians not as a distinct racial group, but, rather, as members of quasi-sovereign tribal entities.").

The corollary to this conclusion is that the special relationship between the federal government and Indian tribes does not allow Congress to accord special protections to groups—such as Native Hawaiian organizations and nonfederally-recognized tribes—that do not have a government-to-government relationship with the federal government. An equal protection challenge to legislation creating a special benefit for such nontribal organizations would likely trigger the heightened scrutiny delineated in *Metro Broadcasting* v. *FCC,* 497 U.S. 547 (1990), and, in the Establishment Clause context, the strict scrutiny standard of *Larson* v. *Valente.* If a court applies these standards, it would probably invalidate S. 2269 in its present form.

To avoid substantial Establishment and Equal Protection Clause challenges, the proposed legislation must rest upon the special relationship between the federal government and Indian tribes. That is, 2269 should extend its protections only to federally-recognized Indian tribes and their designees. Such changes include limiting the definition of "Indian tribe" to federally-recognized tribes and

Alaska Native Villages, and limiting the class of persons who can object to a covered federal activity to Indian tribes and their designees.

B. Cultural protections

S. 2269, as currently drafted, seeks to avoid Establishment and Equal Protection Clause concerns by shifting the focus of the bill from religious to cultural protections. The Court's concern in *Kiryas Joel* about special legislative treatment of particular religions, combined with its willingness to look behind the formal structure of an entity, in that case a school district, to its religious underpinnings, lead us to conclude that the transformation to a cultural protections bill does not suffice to eliminate Establishment Clause concerns.

II. Burden of proof

A. Standard for protections

S. 2269 accords protections where covered federal activities have an "adverse impact" on a Native American sacred site. Section 105(c), 501(c). This standard departs from the familiar "substantial burden" standard that has long been part of First Amendment jurisprudence and was recently reaffirmed as the operative standard in the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. This creates a new standard for protection of Native American religions, one which will have to be given meaning by the courts.[1] Neither the tribes nor the land management agencies will be able to predict the scope of this standard until the issue has been fully litigated in the federal courts. Thus the use of a new term would result in unnecessary litigation. To avoid this delay, we recommend that S. 2269 adopt the "substantial burden" rather than the "adverse impact" standard.

B. Allocation of burdens of proof

Under both Free Exercise Clause jurisprudence and RFRA, the aggrieved party has the initial burden of establishing a substantial burden on religion. Section 104 can be interpreted to depart from that allocation of burdens at the administrative level. Under this interpretation, the aggrieved party would only need to file an objection to a proposed covered federal activity under section 103(e) to trigger an agency burden. The import of this is that the government would have to undertake the compelling interest and least restrictive means analysis for all claims, even if the aggrieved party cannot establish an adverse impact. Section 105(c)(1), however, states that the initial burden rests with the aggrieved party. To make these sections compatible and to avoid saddling an agency with unnecessary procedures, we recommend the following change to section 104(a)(4):

"The Document shall—

[1] The departure from the substantial burden standard may have been designed to bring government land-use decisions within the compelling interest test, thereby, overturning *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which held that government land-use decisions concerning government land were not subject to the compelling interest test. We note that section 105(e) already achieves this result, therefore, departure from the substantial burden test is unnecessary.

"(A) analyze the adverse impact that has been identified by the aggrieved party; *and if the aggrieved party establishes an adverse impact, the government shall—*

"(B) assess whether the interest of the government in proceeding with the action is compelling; and

"(C) assess, based on an analysis of the alternatives to the proposed action, including any alternatives offered by an Indian tribe or its designated representative, that the proposed activity is the least restrictive means of furthering that compelling interest."

III. Miscellaneous changes

The access provision in section 102(c) applies to "Federal lands." The bill, however, does not define "Federal lands." To avoid confusion, we recommend that the term be changed to "Federal public lands."

Section 104(b) does not specify what happens under the secrecy provision if the tribe fails to identify alternatives. We recommend that the bill clarify that the burden on the government is not triggered if the aggrieved party does not meet its burden of providing alternatives.

Section 501(a)(2) provides for judicial review in "[a]ny appropriate United States district court." Some statutes, such as the Federal Power Act, provide for review of agency action in the court of appeals. The Department believes that, in these circumstances, review of agency action pursuant to S. 2269 also should be limited to the court of appeals. To depart from this generally accepted practice would invite simultaneous challenges to an agency decision in the district court and the court of appeals. We recommend the word "district" be removed from section 501(a)(2). The provision would read: "Any appropriate United States court shall have original jurisdiction over a civil action. * * *"

Section 501 also specifies that courts shall not defer to agency factual findings unless there is a hearing on the record. Section 501(b)(1). We believe that aggrieved parties should be encouraged to present their best case to the agency. To encourage this, we recommend that the bill provide that agency factual findings will be upheld when supported by the record.

IV. Conclusion

The Department would like to underscore again its support for the goals of this bill. We believe that the best way to achieve these goals is to pass a bill that will provide strong protections and that will not be mired in lengthy litigation over its constitutionality. We believe that our proposed changes are necessary to achieve those goals.

We look forward to working with the Committee and the tribes to assist in drafting a bill that will be both workable and constitutional so that we may hasten the day when protections for traditional tribal religions are a reality.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

SHEILA F. ANTHONY,
Assistant Attorney General.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, August 10, 1994.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department on S. 2269, the "Native American Cultural Protection and Free Exercise of Religion Act of 1993."

The Department strongly supports the principal purposes of the bill, and with appropriate modifications, we believe such a bill should be enacted. We appreciate that the Committee has made many revisions to the bill in an effort to address concerns of the agencies, and a number of those concerns have indeed been met. However, this Department, the Department of Justice, and other agencies continue to have significant substantive concerns with the current version of the bill which must be resolved if the Administration is to support a bill.

We support providing a process in federal decision-making to focus timely attention on protection of Native American religious sites and practices. We support application of the compelling interest test to justify government burdens on those religions, with certain adjustments to case-law limitations to recognize the unique characteristics of Native American religions. We support liberal provisions for access by Native American practitioners to public lands for traditional religious purposes, recognizing the mandates of government land managers for resource protection and other matters. We support protection of the opportunity of Native American prisoners to practice their religions to the same extent as prisoners who are practitioners of other religions. We support improvement of access of Native American religious practitioners to eagle parts and feathers for traditional religious purposes.

S. 2269 is the successor to S. 1021, about which the Department has testified and has held extensive discussions with the Committee and the Indian community over the past year. S. 2269 makes many significant changes to S. 1021, many apparently derived from these discussions. There are a number of changes which we support. Some of the changes we do not support.

The bill has been yet further amended within the past few days. We have just received the latest amended bill. Consequently, we need to look further at the amended bill to adjust comments prepared for the earlier substitute bill.

We will discuss a few of the major issues in this letter; there are many more issues of a more specific and technical nature. It appears from an initial review of the amended bill that the matters addressed in this letter are applicable to the initial S. 2269 and to

the amended version. We will provide additional views on all the issues as soon as appropriate. We will continue to work with the Committee to develop an agreeable bill.

Negotiated agreements

S. 2269 incorporates the concept of negotiated agreements between agencies and tribes for purposes of protecting sacred sites. These agreements would identify areas of tribal interest, and procedures for consultation on agency decisions affecting the tribal sites and practices; they could also address issues of access to federal lands and other matters of mutual interest between a tribe and the agency. We strongly support this process of specific negotiated agreements and we encourage agencies to reach out to tribes to develop such agreements, even in the absence of a statute. We support the inclusion of provisions for agreements in the bill.

The addition of "culture"

S. 2269 adds cultural sites and practices to the protections of the bill, which were applied only to religious sites and practices in the former bill. The current bill is therefore far broader in scope than the original. This fundamental change was made in an effort to avoid issues of constitutionality under the establishment of religion clause, while extending coverage to Native American groups in addition to federally recognized tribes.

After close examination of the bill, we recommend deletion of "culture" from the principal provisions of the bill.

Despite the addition of culture, the bill continues to highlight religious protection throughout and various terms and provisions are still centered around religion. We are not convinced that the changes wrought will avoid the problem of constitutionality.

We defer to the Justice Department for principal comments on constitutionality. However we note that in the very recent Supreme Court case of *Board of Education of Kiryas Joel Village School District* v. *Louis Grument, et al.,* decided June 27, 1994, the dissent suggested a possible cultural approach, with specific reference to American Indians, as a justification for the establishment of a school district in New York specifically for a sect of Hasidic Jews. That approach was not accepted by the majority, which declared the special school district a violation of the establishment clause. This decision strongly suggests that the cultural approach will have to be undertaken very carefully and not appear to be merely cosmetic or a game of semantics.

It is not clear what is the extent of additional claims or issues that may actually be raised by the addition of "culture" to the coverage of the bill, but the potential expanded coverage is considerable. The term "Native American traditional culture" is far broader than the term "Native American religion". The bill could greatly increase the practices and the sites, as well as the persons, which are eligible for consideration. This would significantly increase the management responsibilities of the affected government agencies.

In certain areas, where we fully supported the purposes of the bill as applied to religious protection, the addition of the cultural approach raises additional issues of a legal and practical nature, not anticipated in the former religious focus of the bill.

Concern has been expressed by Interior bureaus and other federal agencies that the addition of "cultural" to the access provisions in section 102 greatly expands both the range of users and the potential uses for which access may be claimed, and the potential for conflict with other public uses and mandates. For example, the amount and type of gathering, agriculture, hunting, and fishing, that could be claimed under "cultural" activity is much greater than strictly religious activity, and would not ordinarily be afforded the same level of protection. We believe that access and use for cultural purposes should be established under other relevant authorities and under the general management priorities of the affected agencies.

To add "cultural" to the section on use of eagles and other animals and plants greatly expands the potential field of eligible users and the demand for eagle feathers and parts, which may undermine our responsibilities under the Eagle Protection Act. This provision far exceeds our current responsibilities and administrative efforts to place a priority on access to eagles and eagle parts for Indian religious use. The addition of "culture" in this context is inappropriate.

The use of the term "culture" in the context of religious access of prisoners would appear to provide rights to practitioners of Native American religions and cultures exceeding those provided to practitioners of other religions. This raises problems under the equal protection clause of the Constitution and problems of a practical administrative nature in identifying practices and leaders to be recognized.

Compelling interest

A principal purpose of the bill is to establish firmly the religious rights of Native Americans by reaffirming the application of the compelling government interest test for warranting government action which substantially burdens or conflicts with Indian religious sites and practices. We support that purpose.

With respect to the compelling interest test, the bill follows and would enhance the recently enacted "Religious Freedom Restoration Act of 1993" (RFRA) (P.L. 103–141). That law overrruled the Supreme Court case of *Employment Division* v. *Smith,* 494 U.S. 872 (1990), which diminished the applicability of the compelling interest test. The purpose of RFRA was to re-establish that test to protect all religions from government action which substantially burdens a religious practice. As you know, the Administration fully supported the enactment of RFRA.

We note that the new bill significantly alters the language of the substantive tests applied by RFRA. We believe the bill should track RFRA as closely as possible in its focus on religion and in terminology. The application and implications of RFRA, newly enacted, are not yet fully understood; this bill would add both new meanings and confusion to the constitutional and practical management applications of RFRA. The bill adopts the term "adverse impact", while RFRA uses the concept of "burden", in the application of the compelling interest test. The bill changes the allocation of burdens to place all of the burdens of proof on the government and may be interpreted to require government agencies to establish a compel-

ling interest in every case in which a claim of adverse impact on Indian religion or culture is raised in administrative review. RFRA requires the showing of a substantial burden on religion to trigger the compelling interest test.

The bill would remove the limitations imposed on the application of the compelling interest test by the Supreme Court case of *Lyng* v. *Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988). The Department supports this application. The *Lyng* case imposes unique and serious burdens on Indian religions, given the nature of Indian sites and practices, and this unfair burden needs to be corrected. Under *Lyng,* destroying or paving over a religious site would not constitute a burden on religion. Under the bill, the compelling interest test would apply, for instance, the actions that would disturb the integrity of a religious site.

Administrative review process

The other principal significance of this bill is the federal review process that it would provide to assure sufficient attention is paid to the unique needs of Indian culture and religions early in the review and decision-making process for prospective federal actions. We support such a review process that identifies and avoids potential conflicts with Indian religious practices as early as possible, encourages agencies to work cooperatively with tribes, and seeks to avoid litigation and prolonged court battles.

This review is necessary in light of a history of discrimination against Indian religious, dating back to colonial times, and continuing to present times. This discrimination has been frequently manifested in government actions which impair Indian religions while failing to appreciate the importance and uniqueness of their sites and practices, and their differences with more traditional practices.

Under the terms of the bill, the review process would be combined to the maximum extent possible with any other review processes, such as NEPA, that might be applicable to the proposed action, and with existing Federal agency land management review processes. However, some provisions of the bill are incompatible with existing statutory review and consultation mandates that affect operations of many U.S. agencies. Such provisions should be revised to make the review process under the bill more compatible with the existing processes for the Department and the Administration to support the review features of the bill.

Eligible tribes and Native American groups

The bill would apply to broad array of Native American groups. The definition of tribe has been significantly simplified and improved from the earlier bill, but the application would extend to many individuals and groups who are not members of federally recognized Indian tribes.

We had earlier objected to the previous bill, a bill focused only on religious protection, in that it applied to Native American groups that are not federally recognized. This objection was based on both the constitutional prohibition against establishment of religion, *and* on problems of scope and manageability. For constitutional reasons, we needed to rely on the government-to-government relationship. For management reasons, we believed that the deter-

mination of those who could claim the protections of the bill should come primarily from within the tribal community, i.e, the tribes, and thus avoid placing excessive burdens on agency managers to decide who are legitimate practitioners of Indian religion, (and in the case of this bill, practitioners of Indian culture). Reliance on recognized tribes would satisfy both concerns.

Upon close examination of this bill, we continue to hold the view that the bill should address principally the federally recognized tribes.

We take this view based on a number of considerations. We are not confident that the bill as written will solve the constitutional issues it attempts to solve. The bill should focus on reaffirming the first amendment principles sought to be affirmed.

Also, the new bill opens up many more issues of scope and manageability by adding culture to the mix, and in doing so, puts far more responsibility on managers in pure numbers and in deciding who are legitimate Indian practitioners. It raises more questions about unknowns than even the prior bill. We would continue to protect the federal-tribal government-to-government relationship and to focus on the protection of the traditional Native American religions. It would be better to rely on the firmer foundation and focus on the do-able first, get the process underway, and then work to find the best ways to address the concerns of the unrecognized groups.

"Covered Federal activity"

The types of activities covered by the bill, under the term "covered federal activity," section 3(4), are substantially as discussed among this Department, the Justice Department, the Committee, and the Native American Rights coalition. The bill would apply to most Federal or Federally assisted programs and activities, new or reauthorized, licensed, approved, or delegated by the Federal government, or with more than de-minimis federal funding, programs funded with federal highway funds, programs licensed by the Federal Energy Regulatory Commission, or the Nuclear Regulatory Commission, and hazardous waste disposal.

Significant exclusions are: most activities on private lands; routine activities determined through negotiations with tribes to be unlikely to affect sacred sites or traditional practices; and routine maintenance activities; actions with de minimis federal funding; and federal loans and guarantees to private entities. While we are in basic agreement with these provisions, we are continuing to examine certain issues, including the proper treatment of vested leasehold and other private third party interests.

Religious use of peyote

The bill as introduced provided protection for use of peyote for Native American religious purposes and a uniform national basis of protection consistent with current DEA regulations. The Administration fully supports the provisions of H.R. 4230, a separate bill dealing only with religious use of peyote that was recently passed by the House after negotiations with the Administration.

Other issues

We will provide further comment on these and other issues in the near future.

Among the additional issues which are of concern to the Department and other agencies are:

The proper treatment of vested third party interests, such as leasehold, mining claims, and others;

The proper treatment of the Endangered Species Act under the bill, including a possible total exemption;

The proper treatment of non-recognized groups, including Native Hawaiians;

The definition of site;

Satisfactory recognition of agency mandates and environmental protection in federal lands access provisions;

Consultation provisions and the definition of consultation;

90-day notice in the project review provisions;

Application of confidentiality and secrecy provisions;

Application of the bill to certain military activities;

Clarification of the scope of the emergency provision; and

Procedures and standards for administrative and judicial review.

Some of these issues are very significant and how they are resolved may determine whether the Department and the Administration can ultimately support enactment.

The Department and the Administration strongly support a positive and pro-active federal approach to the protection of Native American religious sites and practices, and to ending the history of discrimination and lack of understanding and sensitivity to these religious traditions. While the Administration recommends significant changes to S. 2269, we believe the changes represent the best program for protection consistent with the Constitution and with manageability. We fully support the enactment of a bill consistent with the principles we have outlined.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administrations program.

Sincerely,

ADA E. DEER,
Assistant Secretary for Indian Affairs.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that S. 2269 does not effect any change in existing law.

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